IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-649

DEMOPOLIS CITY SCHOOL
SYSTEM,

Petitioner,

v.

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Demopolis City School System, prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case on August 8, 1977.

OPINIONS BELOW.

The opinion of the District Court for

the Middle District of Alabama (Three-Judge Panel), dated June 29, 1970 (R.4) is unreported.

The opinion of the District Court for the Southern District of Alabama, dated December 29, 1976 (R.56) is unreported.

The opinion of the Court of Appeals for the Fifth Circuit is not yet officially reported but will be officially reported in _____F. 2d _____.

The Order of the Court of Appeals for the Fifth Circuit denying Petition for Rehearing En Banc is unreported.

The Order of the Court of Appeals for the Fifth Circuit denying Petitioner's Motion for Recall and Stay of the Mandate is unreported.

JURISDICTION

The Judgments of the Court of Appeals

for the Fifth Circuit were made and entered on August 8, 1977, and copies thereof are appended to this Petition as Appendix C at Pages 57-61 . The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

On the 29th day of June, 1970, a Three-Judge Panel sitting as the District Court for the Middle District of Alabama rendered its terminal order of desegregation in this cause (Appendix A, Pages 39-48) and the cause was then transferred to the District Court for the Southern District of Alabama, the district in which the System is geographically located. By order of the District Court for the Southern District of Alabama, notice issued that the cause would be removed from the docket un-

less objections were filed by any of the parties. The Respondent, as Plaintiff-Intervenor, requested an extension of time for filing objections and on the 14th day of July, 1975, filed an Application for Order to Show Cause, setting out that since the original desegregation order, the Swann[1] case had enunciated new and additional constitutional standards which should be applied and that a new plan of desegregation should be instituted for petitioner's schools, citing the fact that the Eastside Elementary School was still virtually all black and Westside Elementary School was virtually all white.

Respondent's position was that pairing of the elementary schools was the only ac-

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1. Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (1971)

ceptable method of further desegregating the system, and that further desegregation was required to meet constitutional standards of Swann.[2]

Petitioner's position was that the racial imbalance alleged by Respondents was not, in and of itself, a sufficient showing to require or justify the overturning of the desegregation order of the Three-Judge Panel of the 29th day of June, 1970 (to which Respondent had not filed any objections or any appeal); that the imbalance was a result of changes in demographic patterns, and large registrations of whites in private schools; that the burden was on Respondents to prove some act of discrimination on the part of the

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2. Swann v. Charlotte-Mecklenburg Board of Education, Supra.

school authorities; that no constitutional violations by the school authorities had been shown by the Respondents; and that even if any such actions on the part of the school authorities had been shown, a pairing of the elementary schools was entirely unfeasible and would work an unreasonable hardship on the students as well as the school system. The District Court, after a full hearing, found no basis for altering the Three-Judge Panel terminal order of the 29th day of June, 1970, and rendered its order on December 29, 1976 (Appendix, Pages 49-56), declaring the system unitary and denying the Respondent's request to pair the elementary schools.

As basis for its ruling, the District Court found that the original Three-Judge Court had before it for consideration the

same information now before it- the size of the elementary schools, the distance to be traveled, that pairing would require transporting these small children as much as three miles, and other factors- and chose the present plan; that the school board had not undertaken any procedure or process that continued or enhanced segregation; that prevailing facts had not changed to any material degree since the terminal order; and that unreasonable financial burdens would result from pairing.

The Court of Appeals for the Fifth Circuit vacated the order of the District Court and remanded the case to that Court with directions that the elementary schools be paired.

As basis for its ruling, the Fifth Circuit Court of Appeals took the position

that desegregation "had never begun" in the elementary schools of Demopolis; that the racial balance in the schools entitled the Court to presume an "intent to discriminate" on the part of local authorities,[3] that the principal laid down in Dayton Board of Education v. Brinkman[4] did not apply, and that the "evil was clearly system-wide', thus requiring pairing. That Court also recognized the fact, however, that the two elementary schools were two and one-fourth miles apart and were in a small city "spanned by mostly walking distances".

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3. The Court of Appeals Order stated: "In so extreme a case and on these unique statistics, we think we are entitled to presume an intent to discriminate on the part of local authorities, and we do so."

4. Dayton Board of Education v. Brinkman, 45 U.S.L.W. 4910, 4913 (U.S.,June 28, 1977)

The evidence shows there is no public transportation available to these small children.

THE QUESTIONS PRESENTED ARE:

1. May the Court presume an "intent to discriminate on the part of local authorities solely on the basis of racial imbalance where segregation by law has long since ceased, and in the light of recent decisions such as Dayton Board of Education v. Brinkman, 45 U.S.L.W. 4910,4913 (U.S., June 28, 1977)?

2. Where segregation by law has long since ceased, what burdens of proof, if any, must the Respondent meet in order to entitle him to the fashioning of a system-wide remedy? Has the Respondent in this case met the required burden of proof to justify the remedy mandated by the Court

of Appeals of the Fifth Circuit?

3. Did the terminal order of the Three-Judge Court, dated June 29, 1970, as applied to the City of Demopolis School System abuse any constitutional principles laid down in Swann v. Charlotte-Mecklenburg Board of Education?[5]

4. Can the finding of the Court of Appeals for the Fifth Circuit that the procedure laid down by the Supreme Court in Brinkman[6] is not applicable to the instant case be sustained under the facts of this case?

5. Is the same criteria to be used in eliminating racial imbalance in an elementary school as in schools attended by older children?

6. Are the individual constitutional rights of elementary students attending school in a small city, such as Demopolis, Alabama, to be preserved and treated in the same manner as those of individual elementary students in a large city, such as Dayton, Ohio; especially in relation to hazards, distance, and expense?

7. Does the evidence presented by the record on appeal to the Circuit Court of Appeals for the Fifth Circuit sufficiently support its opinion nullifying the ruling of the District Three-Judge Panel of the 29th day of June, 1970, and overturning the findings and vacating the order of the District Court of the 29th day of December, 1976, and mandating a pairing

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5. Swann v. Charlotte-Mecklenburg Board of Education, Supra.

6. Dayton Board of Education v. Brinkman, Supra.

of the elementary schools in Demopolis?

8. Can the action of the Court of Appeals for the Fifth Circuit be sustained in this case when no complaint by any parent has been shown by the evidence to exist alleging that any child is being deprived of equal protection by these school authorities; and where no evidence has been adduced of discrimination on the part of school authorities or of any act on their part to preserve segregation?[7]

9. Is the order entered by the Court of Appeals for the Fifth Circuit in the instant case in conflict with the applicable decisions of this Honorable Court in Washington v. Davis[8] and Dayton Board of Education v. Brinkman[9]; and/or is it in conflict with its own ruling in Lee v. Macon County Board of Education (City of Tuscaloosa School System, et al.) (429 F.2d 1218)

10. Does the order of the Court of Appeals, in failing to give effect to the findings of the District Court and basing its decision on a "presumption of intent to discriminate on the part of local authorities" simply because of racial imbalance reflect a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision?

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

Pertinent portions of the Civil Rights Act of 1964 - 42 U.S.C. 2000c-6(a).

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7. Civil Rights Act of 1964 (42 USC 2000c-6(a).

8. Washington v. Davis, 426 U.S.229,239 (1976)

9. Cited Supra.

STATEMENT

The suit out of which this petition arises originated in 1963 in the Middle District of Alabama as Lee v. Macon County Board of Education - C.A. No. 604-E (M.D. Ala.) The suit was originally under the jurisdiction of a Three-Judge Court and the Petitioner, through its Superintendent and Board of Education, was made a party Defendant, on October 14, 1968, for the purpose of desegregating the system and removing therefrom all vestiges of a dual school system. After various hearings in which the United States participated as Plaintiff-Intervenor, and the submission of various plans for desegregation, both by the Defendant and by the government as well as the then Plaintiff in the cause; and consideration of the various enroll-

ment statistics, capacity of the different school plants in the system, geographical and transportation matters, the Court did not accept the desegregation plan of the school system, nor of the government, but on June 29, 1970, entered a final order of desegregation based on a plan constituted by the Court itself, whereby grades 7-12 were paired and housed in two formerly all white schools located reasonably near the geographical center of the system. A formerly all black school located on the East side of the city was converted into an elementary school housing grades 1-6, and an existing elementary school on the West side of the city was maintained as an elementary school housing grades 1-6. The Court then chose its own geographic zone line in such manner as to maximize desegre-

gation based upon the evidence submitted to it as to the racial distribution of the students in the system.[10]

The petitioners then proceeded to operate the school system under the desegregation order of the Three-Judge Court and the cause was transferred on July 7, 1970, to the United States District Court for the Southern District of Alabama, the geographical area where the school system was located. After the Three-Judge Court order had been in force and effect for more than five years, the United States, as Plaintiff-Intervenor, filed an application for Order to Show Cause on July 14, 1975, requesting that the petitioner school system be required to develop and implement a new plan

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10. See Appendix A, Pages 39-48

of desegregation which would more fully desegregate the two Demopolis elementary schools. A considerable evidence was thereupon developed in connection with this Motion, including various hearings, depositions and, at the Court's direction, a report of the petitioner school system dated June 21, 1976, setting out the result of petitioner school system's study of the feasibility of various alternative methods which may produce a greater degree of actual desegregation. (R. 30) As may be readily seen from the record, the District Court made a full study of all factors involved in the matter, including transcripts of the original 1970 hearings before the Three Judge Court. A formal hearing was held on December 7, 1976, and the matter was taken under advisement by

the Court, which thereafter on December 29, 1976, entered its order denying the injunctive relief sought by the United States, Plaintiff-Intervenor, and finding the Demopolis City School System to be a unitary system (R. 56).[11]

On January 13, 1977, Respondent, Plaintiff Intervenor, filed notice of appeal. Petitioner requested oral argument, which was not granted by the Court of Appeals. Thereafter, on August 8, 1977, the Court of Appeals entered its order vacating the District Court order, remanding the cause, and directing the District Court to require the pairing of the two elementary schools in the system.[12]

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11. See Appendix B, Pages 49-56

12. See Appendix C, Pages 57-61

This Petitioner timely filed a Motion for Recall and Stay of the Mandate of the Court of Appeals pending the Petitioner's Request for a Rehearing En Banc.[13] This Motion was denied by the Court of Appeals on September 16, 1977.

In the meantime, this Petitioner had timely filed with the Court of Appeals its Petition for Rehearing En Banc.[14]

On October 4, 1977, the Court of Appeals advised counsel for Petitioner that on that date an order was entered, denying the Petition for Rehearing and for Rehearing En Banc.[15] A request for Oral Hearing

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13. See Appendix D, Pages 62-72

14. See Appendix E, Pages 73-85

15. No original order has yet been received by Petitioner, but see Appendix F, Pages 86-87

on the part of this Petitioner in connection with the Petition for Rehearing was not granted by the Court of Appeals.

The Court of Appeals, in its order, cited certain statistics pertaining to racial balance in the two elementary schools for the school year 1970-71, 1974-75, and 1975-76. The Court's findings reflected a high of thirteen black students attending the Westside School in 1975-76. However, the Record shows that at the time of the hearing of September 7, 1976, in the District Court, the testimony was at that time that twenty-eight black students under the majority to the minority transfer provision alone were attending the formerly all white Westside School.[16/] While the Court of

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16. Record, Volume 2, Page 108.

Appeals found that the two elementary schools are about two and one-quarter miles apart by road, it related this fact to a drive "under ten minutes" and indicated in its order that the schools were separated by "no very significant barriers". The Record, however, shows that there is no available transportation for the students (R.,Vol.2,Page 103); that students would have to walk as much as three miles in order to attend school if these elementary schools were paired (R.,Vol.2,Page 102). The Record also readily reflects (R.Vol.3, U. S. Exibits 5-10) that two large river sloughs constitute barriers between the two elementary schools and are bridged by only one arterial street. Also, that there are no provisions for foot traffic along that route (Appendix D, Page 66 & 71)

The order does not appear to take into consideration the fact that the Three-Judge Court order was dated and rendered on June 29, 1970, which was during the vacation period between the end of one school term and the beginning of another; and that during that period of time, the demographic patterns changed, a factor over which the local authorities had no control, so that many of the white members of the Eastside neighborhood were no longer residing in that zone at the opening of school the following fall. (R.,Vol.2I, Pages 103 and 104)

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it is in conflict with the applicable decisions of this Court as laid down in Dayton Board of Education v. Brinkman, Supra., Washington v. Davis, Supra., and

others.[17]

The Court of Appeals seeks to avoid a conflict with the decision in Brinkman, Supra. by assuming the position that that decision does not apply in the instant case.[18] Nevertheless, the Brinkman decision clearly places upon both the District Court and the Court of Appeals the duty to first determine whether there was any ac-

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17. Green v. County School Board, 391 U.S. 430, 88 Sup.Ct.1689, 20 L.Ed.2d 716 (1968);
Austin Independent School District v. United States, 97 Sup.Ct. (1977);
Milliken v. Bradley, 418 U.S. 717,738 (1974).

18. The Court of Appeals says:
"Here it is true segregation 'by law' has ceased, but all is as it was before it did. The only elementary schools Demopolis has are one race schools, and the black school is about as black today and the white school about as white as either ever was.

tion in the conduct of the business of the school board which was intended to, and did, in fact, discriminate against minority pupils, teachers or staff. In the instant case, we are dealing with the question primarily of whether or not the racial balance in the two elementary schools resulted from some discrimination practiced by the local authorities. Both the Brinkman case and the Washington case clearly set out that if such violations are found, the Court must then determine a remedy designed to redress the effect of such violations. The Court of Appeals does not presume to find any such violations on the part of local authorities but simply takes the position that it feels that it is entitled "to presume" an intent to discriminate on the part of local authorities. There has been no

finding that such discrimination did, in fact, occur. On the contrary, the District Court with considerable more opportunity to examine and weigh all of the facts in the particular case, in dealing with the question of whether there were any instances where the school board failed to strictly enforce attendance zoning, stated: "The Court is satisfied from the evidence that where this problem has existed, it has been substantially corrected, if not totally so, and that diligence is being employed by the school board to insure the integrity of that part of the Court's prior order".[19]

The areas in which the present decision of the Court of Appeals conflicts with the

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19. See Appendix B, Page 55

decisions of this Court may be divided into two general areas, as follows: (1) In many instances, the one race or virtually one race school does not reflect a constitutional violation but rather neighborhood patterns and changes in demographic patterns and other reasons beyond the control of school authorities.[20] In Austin Independent School District v. United States, 97 Sup. Ct. (1977), it is stated: "The principal cause of racial and ethnic imbalance in urban public schools across the country, north and south, is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimi-

20. Swann v. Charlotte-Mecklenburg School Board, Supra.

nation in housing- whether public or private- cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns." The Court of Appeals in the instant case, has erroneously concluded that the predominantly one race schools, virtually by the fact that they exist at all, justifies a conclusion of an"intent to discriminate" on the part of local authorities; while the evidence is abundant and uncontroverted that the situation existed as a result of change in demographic patterns, as defined in Austin Independent School District, Supra. In the Dayton case, Supra., it was said "It is clear from the findings of the District Court that Dayton is a racially mixed community and that many of its schools

are either predominantly white or predominantly black. This fact, without more, of course, does not offend the Constitution. (Citing Spencer v. Kugler, 404 U.S. 1027 (1972); and Swann, Supra. at 24).

All of the above cited decisions of this Court make it abundantly clear that the mere existence of one race schools or predominantly one race schools is not an evil, so as to offend the Constitution, without more. It is, therefore, apparent that the mere existence of such schools cannot create any entitlement to presume an intent to discriminate on the part of local authorities.

(2) In the Dayton case, Supra., this Court clearly spelled out the responsibilities of the District Court and of the Court of Appeals in the matter of fitting the

remedy to the constitutional violation. In the instant case, the decision of the Court of Appeals fashions a system-wide remedy without making a finding of any action in the conduct of the business of the school board which discriminated against the minority pupils, basing its presumption only upon the existence of one race schools in the District which, in and of itself, does not offend the Constitution. We believe this shows a clear conflict with recent decisions of this Court, such as the Dayton case, Supra., wherein it is stated: "The Court of Appeals seems to have viewed the present structure of the Dayton School System as a sort of 'fruit of the poisonous tree", since some of the racial imbalance that presently obtains may have resulted in some part from the

three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a system-wide remedy going beyond their scope". In the instant case, there are no specific violations found by any Court to have existed other than the simple existence of a racial imbalance in the elementary schools.

The decision below is also in conflict with a number of decisions rendered in the Fifth Circuit Court of Appeals generally in support of the decisions of this Court cited above. For instance, it was reiterated in Carr v. Montgomery County Board of Education, 377 Fed.2d 1123, that the Swann case, Supra., as well as many of the more recent school cases, readily recognizes

that minority groups are often found concentrated in one part of the city, and that the existence of some one race or virtually one race schools within a District is not in and of itself the mark of a system that still practices segregation by law. More specifically, in speaking of one race schools in Jefferson County, Alabama, in Linda Stout v. Jefferson County Board of Education (Cause No. 75-2978 (1976) the Fifth Circuit Court of Appeals stated: "The true issue then is whether the plan adopted by the Court below was,given the circumstances, a permissible one. We conclude it was. In so concluding, our guiding lights are the trial court's conclusions that the Jefferson County System has been effectively desegregated and is unitary, and that these three one race schools are

the products of geography and demography alone. If these conclusions are sound,and they appear to be, then any bussing of pupils attending these schools would be ordered in the name of racial quotas or balancing. The Constitution does not require such orders." In the instant decision by the Court of Appeals, however, the findings of the lower Court in regard to the question of whether the petitioner system is unitary was not accepted but was found to be clearly erroneous. The only distinction in the facts would be in the degree to which the geography and demography might apply in relation to a large school system vis-a-vis a small school system such as the petitioner system.

Bringing the matter a little closer to home is the case of Lee v. Macon

County Board of Education (City of Tuscaloosa School System), 429 Fed.2d 1218, et seq. The facts in that case are almost identical,if not completely so, with the facts of the present case except for a difference in the size of the cities involved. That case deals specifically with the question of pairing of elementary schools in the City of Tuscaloosa. In that case, the Court of Appeals for the Fifth Circuit made the following observation: "It is obvious that the HEW plan gave little consideration to residential proximity and that many students, white and black, would be required to cross town at great distances, traversing railroad and switchyard tracks, whereas, under the school board plan, geographic considerations were more realistic and practical." The Court went on to say that there was little dispute as to the basic

fairness of the geographic school zones drawn by the Board. In criticism of the HEW plan, the Court of Appeals stated: "Little consideration is given to geographic proximity in the proposed pairing of Oakdale-Stillman Heights Elementary Schools. Many of the students walk to school. Oakdale is a large zone territorially and elementary students living in the Southwestern portion thereof would have to traverse great distances to reach Stillman Heights School, most being compelled to walk along U. S. Highway 11. Elementary students living in the upper half of Stillman Heights zone would likewise traverse considerable distances and be compelled to use U. S. Highway 11 to reach Oakdale." The Court of Appeals then concluded that the plans adopted by the District Court were sound-

er and more practical than any of the others recommended and were made in the exercise of a reasonable discretion based on considerable expertise in dealing with numerous school desegregation cases.

The need for review in this particular case is also highlighted by the need to resolve clearly whether the rights of individual elementary school children living in a school zone located in a city the size of Dayton, Ohio, and the size of Tuscaloosa, Alabama, are to be protected and treated in a different manner from the rights of individual school children of like age in a school zone in a city the size of Demopolis,Alabama. As Mr. Justice Brennan very ably put it, in charging the Court with its duties: "It should be flexible but unflinching in its use of its equitable

powers, always conscious that it is the rights of individual school children that are at stake and that it is the constitutional right to equal treatment of all races that is being protected."[21] In this connection, the District Court in that case had announced (without being controverted by this Court) that certain guidelines were to be followed in the case of elementary school students, among which were: "2. Students should be transported to the nearest available school; 3. No student should be transported for a period of time exceeding twenty minutes or two miles, whichever is shorter." Yet, in the instant case, the effect of the mandate by the Court of Appeals would be to place elementary grade students in the position of having to walk as much as three

21. Dayton Board of Education v. Brinkman. Supra.

miles or more in order to attend their schools (Record, Vol 2I, Page 102), and under most hazardous circumstances in all kinds of weather. (Appendix D, Page 65)

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

CIVIL ACTION NO. 604-E

CITY OF DEMOPOLIS SCHOOL SYSTEM

(Filed Jun 29, 1970, by R. C. Dobson, Clerk)

ANTHONY T. LEE, ET AL.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor and Amicus Curiae,

NATIONAL EDUCATION ASSOCIATION, INC.,

Plaintiff-Intervenor,

vs.

MACON COUNTY BOARD OF EDUCATION, ET AL.,

Defendants.

O R D E R

As required by the order of this Court of August 6, 1969, the Demopolis City Board of Education on December 2,1969, filed its proposed plan, to be effective with the commencement of the 1970-71 school year, for the complete disestablishment of

of its dual school system based upon race. On December 15, 1969, this Court found it necessary to reject the proposal made by the Demopolis City Board of Education and ordered the United States, through its office of Education, to formulate and submit a plan designed to disestablish completely the dual school system operated by the Demopolis City Board of Education not later than the commencement of the 1970-71 school year. On February 16, 1970, the United States filed such a plan. The Demopolis City Board of Education objected thereto and filed an alternate plan. The plaintiffs objected to the Board's alternate plan. The several proposals, together with the objections thereto, were heard by this Court on March 27, 1970. After this hearing and on April 3, 1970, this Court, in a formal order, observed that a further study of the Demopolis school system should be made in an effort to formulate a more feasible plan of desegregation than any of the plans presented to this Court up until that time. On May 27, 1970, the Demopolis City Board of Education submitted a further alternate plan for the desegregation of its school system, and on June 4, 1970, the plaintiffs filed their written objections thereto. On June 19, 1970, another hearing was conducted in connection with the Demopolis School System, and the matter is now submitted.

Upon consideration of the several plans of desegregation as filed with this Court by the Demopolis City Board of Education and the United States through its Office of Education, and the several objections filed to each of these plans, it is

the ORDER, JUDGMENT and DECREE of this Court that commencing with the 1970-71 school year, the Demopolis City Board of Education shall operate one high school complex offering grades 7 through 12, which high school shall be attended by students of both races in said grades. It is further ORDERED that this high school complex use as its physical plant the Demopolis High School and the old Demopolis Elementary School.

It is further ORDERED that effective with the commencement of the 1970-71 school year, the Demopolis City Board of Education shall operate two elementary schools, each offering grades 1 through 6. The zone line between the two elementary schools shall be a line running south along Cedar Street from the northern city limits to U. S. Highway 80, thence east along Highway 80 to Jefferson Road, thence South along Jefferson Road to the southern city limits. Students of both races in grades 1 through 6 residing east of said line shall be assigned to the East Side Elementary School--formerly the U.S.Jones School--located at Jackson and Front Streets. Students of both races attending grades 1 through 6 who reside west of said zone line shall be assigned to the West Side Elementary School located on Cherokee Street and Mauvilla Drive.

It is further ORDERED that all white students residing outside the city limits of Demopolis who attend grades 1 through 6 in the City of Demopolis school system be assigned to the East Side Elementary School and that all black students residing outside the city limits of Demop-

olis who attend grades 1 through 6 in the City of Demopolis school system be assigned to the West Side Elementary School. It is further ORDERED that the Demopolis City Board of Education enroll in the City of Demopolis school system the black elementary school students who reside in the Shortleaf area of Demopolis and who heretofore have been transported to and have attended the John Essex School operated by the Marengo County school system.

It is further ORDERED that the plan of desegregation as hereinabove ordered implemented by the Demopolis City Board of Education not later than the commencement of the 1970-71 school year contain the following supplemental provisions:

1. Desegregation of Faculty and Other Staff.

The school board shall announce and implement the following policies:

a. Effective not later than the commencement of the 1970-71 school year the principals, teachers, teacher-aides and other staff members who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students. The Demopolis City Board of Education shall assign the teaching staff as above described so that the ratio of Negro to white teachers in each school, and the Negro-to-white ratio of other staff members in each school, are substantially the same as each such ratio is for the teachers and other staff members in the entire system.

The school system shall, to the extent necessary to carry out this aspect of its desegregation plan, direct members of its staff as a condition of continued employment tc accept any new assignments.

b. Staff members who work directly with school children and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, and dismissed without regard to race or color.

c. If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the City of Demopolis school system which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable nondiscriminatory standards from among all the staff of the school system. In addition, if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race or color different from that of the individual dismissed or demoted until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school system. The school system also shall re-

cord and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general and depending upon the subject matter involved, five years is such a reasonable period.

d. In the event that the school system, in connection with its conversion to a unitary system, plans to dismiss or demote personnel, as those terms are hereinabove used, a report containing the following information shall be filed with the Court and served upon the parties by July 15, 1970:

(1) The system's "nonracial objective criteria" used in selecting the staff member(s) dismissed or demoted;

(2) The name, address, race, type of certificate held, degree or degrees held, total teaching experience and experience in the system, and position during the 1969-70 school year of each person to be dismissed, or demoted as hereinabove

defined, and in the case of a demotion, the person's new position during the 1970-71 school year and his salaries for 1969-70 and 1970-71.

(3) The basis for the dismissal or demotion of each person, including the procedure employed in applying the system's "nonracial objective criteria";

(4) Whether or not the person to be dismissed or demoted was offered any other staff vacancy; and, if so, the outcome; and, if not, the reason.

2. Majority to Minority Transfer Policy.

The school system shall permit a student attending a school in which his race is in the majority to choose to attend another school, where space is available, and where his race is in the minority.

3 School Construction and Site Selection.

All school construction, school consolidation, and site selection (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure once this desegregation plan is implemented.

4. Attendance Outside System of Residence.

If the school district grants transfers to students living in the district for their attendance at public schools outside the district, or if it permits transfers into the district of students who live outside the district, it shall do so on a nondiscriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district or reinforce the dual school system.

5. Services, Facilities, Activities, and Programs.

No student will be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by or affiliated with the school in which he is enrolled. A student attending school for the first time on a desegregated basis will not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, nonracially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school sponsored use of athletic fields, meeting rooms, and all other school-related services, facilities, activities, and programs such as commencement exercises and

parent-teacher meetings which are open to persons other than enrolled students, will be open to all persons without regard to race or color. All special educational programs conducted by the school system will be conducted without regard to race or color.

It is further ORDERED that the Demopolis City Board of Education file with this Court, in writing, on or before August 1, 1970, and furnish copies to counsel for the plaintiff-intervenors, the United States and the National Educational Association, Inc., and the plaintiffs, a projection of the enrollment in each of the schools to be operated by the City of Demopolis school system for the 1970-71 school year, and the racial composition of the student body and the faculty and staff members in each of said schools. It is further ORDERED that the Demopolis City Board of Education file with this Court on or before September 30, 1970, and furnish copies to counsel for the plaintiff-intervenors and the plaintiffs, a written report on the actual enrollment in each of the schools operated by the City of Demopolis school system, and the racial composition of the student body and the faculty and staff members in each of said schools.

Done, this the 29th day of June, 1970.

/s/ Richard T. Rives
United States Circuit Judge

/s/ H. H. Grooms
United States District
Judge

/s/ Frank M. Johnson, Jr.
United States District
Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF ALABAMA

NORTHERN DIVISION

ANTHONY T. LEE, ET AL.,	)	CIVIL ACTION
	)	
Plaintiffs,	)	NO. 5945-70-H
	)	
vs.	)	
	)	
DEMOPOLIS CITY SCHOOL SYSTEM, ET AL.,	)	
	)	
Defendants.	)	

O R D E R

On July 7, 1970 this case was transferred from the Middle District of Alabama to this Court to permit supervision of a terminal order entered by a three Judge Court wherein the school board was instructed to effectuate the desegregation plan set out in that order for the school year commencing 1970-71. On August 22, 1972, a motion for further relief was filed by the NEA and in September of 1972 a motion for supplemental relief was filed by the United States on behalf of plaintiffs Anthony T. Lee and others, neither of which attacked the desegregation order itself. In October of 1972 this Court ordered the parties to confer relative to their complaints and to supply to the Court a memo specifying the areas of disagreement and the areas of agreement so that the Court

could then proceed to hear those areas wherein the parties disagreed. The matter then became dormant.

In March of 1975 the Court instructed the parties to show cause why the case should not be dismissed for lack of prosecution. This promptly created activity resulting in the final hearing on December 7, 1976.

Under the three Judge Order the high school and the junior high school each consolidated into single facilities to which all students attend. The elementary grades were broken into two facilities known, respectively, as East Side Elementary and West Side Elementary. A zone line was drawn essentially through the center of Demopolis dividing the City into the two districts. Those students living east of this line were assigned to East Side and those living to the west of this line were assigned to West Side. East Side is located near the line of demarcation but West Side is located nearly on the west boundary line of the City.

There have been collateral issues that have arisen by virtue of that portion of the Order allowing certain students residing outside of the City of Demopolis to attend schools in Demopolis because of their proximity to the schools of the City, vis-a-vis, the schools of the county, but the Court is impressed that these issues have been resolved and do not constitute a further problem.

The evidence demonstrates that the original three Judge Court had before it for its consideration the same information that has now been presented to this Court: namely, the size of the elementary schools; the distance to be traveled; the fact that East Side was an all black school prior to desegregation and West Side was an all white school prior to desegregation; that the East Side zone had approximately 160 white students zoned to attend East Side and 52 black students zoned to attend West Side; that East Side would have a total of approximately 800 students zoned to attend that school and West Side had a total of approximately 800 students zoned to attend that school;[1] that the HEW plan would have moved the zone line further westwardly and increased the number of whites to be assigned to East Side but in so doing it would have overcrowded East Side by about 300 students; that the proximity of the schools if paired would require transporting students as much as three miles; * that white flight was a po-

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1. See transcript of March 27, 1970 hearing.

* that bussing by the city was not feasible from the standpoint of expense; that the county could contribute to bussing; the effect of bussing;

tential threat; and the many other points that lend themselves to the argument that one proposition or another would be the more desirable. All of these same points were considered by the three Judge Court and the plan now in force opted for. No appeal was perfected from the original Order and no contest of any nature was lodged until August 22, 1972 when the NEA filed a motion for further relief charging, among other things, that the promotion and demotion policies of the school system, to be conducted pursuant to the Singleton opinion, were being violated. Later on September 21, 1972, a motion for supplemental relief was filed on behalf of Anthony T. Lee and others contending that the school board was not enforcing the Court Order in respects therein specified.

On March 31, 197- the Department of Justice advised the Court by pleading that it desired to conduct investigations into this case to see if there had been any violations of the three Judge Court Order and it wasn't until July 14, 1975 that Justice filed an application for order to show cause why a new plan of elementary student assignment ought not be entered to further desegregate the elementary schools. It was and is contended that evolving law mandates such change. For example, in an appendix to the brief filed by the United States in April of 1976 which was obtained from the records on file in this cause, it appears that the population at West Side Elementary went from a total of 511 for the

school year 1970-71 to a total of 456 for the school year 1974-75 and East Side Elementary went from 551 in 1970-71 school year to 403 in 1974-75 school year. The number of white students in the elementary grades has decreased from a total of 495 in 1970 to 398 for a total attrition of 97 while the black population has decreased from 573 in 1970 to 461 for a total of 112.

If the schools are paired, the rough estimate is that each school would have a racial population of 199 white to 230 black or a rough 52% black population whereas the middle school and the upper school have a ratio of 45% to 47% black respectively.

The easy thing for the Court to do would be to simply say that the reasonings employed by the three Judge Court were erroneous; that the findings and conclusions of that tribunal were based on erroneous assumptions; that Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971) changed the law; that the fact that the statistical information available to that Court and the parties , though it has not changed materially, placed no burden or requirement on the plaintiffs to test the accuracy of the conclusions of the Court through the appellate processes; and that the fact that the school board itself has not undertaken any procedure or process that continued or enhanced segregation is of no importance in the equation and therefore the schools should forthwith be paired to maximize desegregation. The

problem is, to so rule tips the veil on this Court's understanding of what the function of the Court is in litigious matters of this type.

A terminal Order was entered and the parties operated under it for more than five years before there was any attempt to question its basics. The facts prevailing at the time the Order was entered have not changed to any measurable degree. The children of Demopolis have operated under the benefits of that desegregated system. The population has become acclimated to that operation. Further tampering by imposing new financial burdens upon an already tightly budgeted system, together with the potential los of muchly needed tax revenue[2] and the real probability of accelerated attrition with its concomitant loss of further revenue from the State, all for no appreciable net gain, seems to be poor justification for this Court to now agree with the 20-20 hindsight of a sometimes visitor from Washington rather than agreeing with the collective judgments of Judge Rives, Johnson and Grooms. This is

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2. In 1977 the voters of Demopolis will determine whether to continue a three-mill special school tax due to expire that year. A favorable vote is highly questionable if the schools are paired. (see transcript).

not to say that more presentable statistics might not be accomplished in doing what Washington wants, but it is to say that the Court finds that the collective wisdom of Judges Rives, Johnson and Grooms is not so wide of the mark as would justify a finding that that judgment did not establish a unitary system.

There are areas which the evidence indicated do need attention however. The assignment of faculty to the elementary schools does not appear to this Court to reflect a proper assignment contemplated by the original decree, though some progress has been made towards this end. The percentage of black teachers at East Side decreased from 73% to 64% as of the fall of 1974 and increased at West Side from 25% to 33% during that same period of time. The Court directs that the school board update those statistics to give the Court promptly the present teacher assignment statistics and what steps, if any, are now being taken to more nearly equalize the faculty.

Some complaint has been registered that the school board has not strictly enforced the attendance zoning, but the Court is satisfied from the evidence that where this problem has existed it has been substantially corrected, if not totally so, and that diligence is being employed by the school board to insure the integrity of that part of the Court's prior Order.

In the case of Youngblood v.

Board of Public Instruction of Bay County, 448 F.2d 770 (5th Cir. 1971) the Court of Appeals for the Fifth Circuit addresses itself to the requirements for concluding a desegregation case on the docket of the Court. That case provided that after a finding by the Court that a system was a unitary system as contemplated by the law and semi-annual reporting by the school board of the conditions of the operation of the system for a period of three years had been accomplished that the cause could be set for hearing on the issues and if the facts then justified, the cause could then be removed. Out of an abundance of caution in an effort to comply with this requirement of the law, the Court now specifically finds that the system in the City of Demopolis is a unitary system and the school board is required to file with the Court on a semi-annual basis commencing thirty days following mid-term of this year and continuing for a period of three years, reports of the schools' activities in accordance with those requirements as specified by the Court of Appeals of the Fifth Circuit in the case of United States v. Hinds County School Board, 433 F.2d 611 (5th Cir. 1970). The school board is further directed that within sixty days of the filing of the sixth such report that it shall cause to be noticed a hearing before the Court for the purpose of terminating all further proceedings in this cause.

Done this 29th day of December, 1976.

/s/ W. B. Hand
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR

THE FIFTH CIRCUIT

No. 77-1233

ANTHONY T. LEE, ET AL.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellant,

NATIONAL EDUCATION ASSOCIATION, INC.,

Plaintiff-Intervenor,

versus

DEMOPOLIS CITY SCHOOL SYSTEM, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

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August 8, 1977

Before BROWN, Chief Judge, MORGAN and GEE, Circuit Judges. GEE, Circuit Judge:

Demopolis is a medium-sized town in Western Alabama which, until 1969, operated a dual school system. As a result of a Court-ordered desegregation plan, all students in grades 7-12 were assigned to one junior and one senior high school. These higher grades have operated since on a desegregated basis. There had, before the Order, been three all-white schools and one all-black one which served all grades. The Order converted the former black school and one of the former white ones to elementary schools serving two geographic zones. Under this plan, it has worked out that the black school, Eastside, remains essentially all black. For the school year 1970-71, it was 95% black, climbing back a percentage point or so at a time to 100% by 1974-75, but falling back to 98% for 1975-76. The other elementary school, formerly white, remained overwhelmingly so: percentages of black students there ranged from a low of nine in 1970-71 to a high of thirteen in 1974-75 and 1975-76. These schools are about two-and-one-quarter miles apart by road, a drive of under ten minutes, and are separated by no very significant barriers. A substantial highway does divide them, but it is controlled by traffic lights. The school board has repeatedly stated that only pairing will effectively desegregate these schools. On these essential and not seriously disputed facts, and without subsidiary findings, the District Court found the Demopolis system unitary.

So finding , it refused to order further measures to alter the racial imbalance in the elementary schools of this small city, and the United States appeals.

This finding of the District Court cannot stand. It is clearly erroneous. See Dayton Board of Education v. Brinkman, _____U.S. _____, 45 U.S.L.W. 4910, 4913 (U. S., June 28,1977). The District Court had obviously hoped that its milder, earlier Orders would have effect to desegregate the elementary schools of Demopolis. They have entirely failed. We do not here contemplate a system including two or three essentially one-race schools resulting from geographic or demographic accidents and surviving as minor anomalies in a broadly integrated program, despite earnest planning and honest effort to eliminate them and those like them, because practical considerations of hazard, distance or expense all but forbid their elimination. Cf. Carr v. Montgomery County Board of Education, 377F.Supp. 1123 (M.D. Ala. 1974), aff'd, 511 F.2d 1374 (5th Cir.), cert. denied, 423 U.S. 986, 96 S.Ct. 394, 46 L.Ed. 2d 303 (1975); Stout v. Jefferson County Board of Education, 537 F. 2d 800 (5th Cir. 1976). This is a case where, in a small city spanned by mostly walking distances, and after eight years, elementary school desegregation has never begun. Nor do we think the procedure carefully laid down by the Supreme Court in Brinkman, supra, for considering such cases as this and the remedies to be granted in future

cases applies here. [1] For the Court com-

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1 The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. Washington v. Davis, supra. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. Keyes, supra, at 213.

45 U/S.L.W. at 4914.

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mences its definitive pronouncement in Brinkman with the words "in a case such as this, where mandatory segregation by law of the races has long since ceased..." 45 U.S.L.W. at 4914. Here, it is true, segregation "by law" has ceased, but all is as it was before it did. The only elementary schools Demopolis has are one-race schools, and the black school is about as black today and the white school about as white as either ever was. In so extreme a case and on these unique statistics, we think we are entitled to presume an intent to discriminate on the part of local authorities, and we do so. It is plain (and practically admitted) that no measure short of pairing the two one-race elementary schools will produce desegregation of them. Milder measures have failed. The evil is clearly systemwide, for all the elementary schools in the system are involved, and all remain effectively segregated. We therefore vacate the Order of the District Court and remand, with directions that the elementary schools of Demopolis be paired and for further proceedings not inconsistent with this opinion. It is so ORDERED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 77-1233

ANTHONY T. LEE, Et al.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellant,

NATIONAL EDUCATION ASSOCIATION, INC.,

Plaintiff-Intervenor,

v.

DEMOPOLIS CITY SCHOOL SYSTEM, Et al.,

Defendants-Appellees.

MOTION FOR RECALL AND STAY OF MANDATE

MOTION FOR RECALL AND STAY OF MANDATE

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Defendants- Appellees respectfully present this, their application for, and move the Court to enter, an Order recalling and staying the Opinion Order and Mandate heretofore issued in this case on August 8, 1977, and in support of said Motion, Petitioner represents unto the Court as follows:

The Opinion Order of this honorable Court was issued as and for the mandate on August 8, 1977, and was received by the Petitioner on August 10, 1977.

Petitioner has filed simultaneously with the filing of this application a Motion for Rehearing En Banc, seeking a further review in connection with the Order of Reversal heretofore issued.

In support of this application, Petitioner adopts the grounds and argument of the Motion for Rehearing En Banc which are incorporated herein by reference.

As further grounds for its application, Petitioner respectfully represents that under the terms of the Order of Reversal and Mandate heretofore issued, Petitioner is required to pair its elementary schools. While no date is specified in the mandate for the pairing of

said elementary schools, the schools of Petitioner open for their fall term on August 26, 1977, and the Order-Mandate was not received until August 10, 1977, as aforesaid. It is physically impossible for the school authorities to plan and implement a pairing of its schools in the short time left remaining from the date of the Order Mandate to the opening of school for the fall term.

Attached hereto and marked Exhibits "A" through "C" inclusive, are Affidavits of the Superintendent of Education and other officials of the school and municipality, detailing the need for this application for a stay of the Order-Mandate.

Wherefore, Petitioner prays that this Honorable Court will recall its mandate and stay the same pending a ruling on Petition for Rehearing En Banc and such other proceedings as may be finally determined by this Honorable Court.

/s/ Hugh A. Lloyd
Attorney for Defendants
Appellees
Post Office Drawer Z
Demopolis, Alabama 36732

STATE OF ALABAMA

MARENGO COUNTY

EXHIBIT "A"

Before me the undersigned authority in and for said State and County personally appeared A. A. Knight who, having been first duly sworn, deposes on oath and states as follows:

My name is A. A. Knight and I am Superintendent Demopolis City Schools, and, as such, am familiar with facts stated herein.

The Demopolis City School's Elementary grades should not be paired in a hurry for the following reasons:

Travel for many of the walking students will be past a cemetary, over two canal bridges, through at least a mile of uninhabited road which would be unduly dangerous to elementary school-age children. In fact, three years ago a rape-murder of a fifth grade child was committed in this particular area during daylight hours.

Unsupervised school children along this route would be exposed to dangers of dog bites, drowning in one of the canals, being run over by automobile or truck or worse.

The road (Maria Street), which is the eastern boundary of Westside Elementary School Campus, is a truck route, heavily traveled by trucks to and from

Miller Lumber Co., Borden Chemical Company, Demopolis Hickory Mill, Grain Elevator for State Docks, River City Industries, (a concrete Products Company) and Saunders Truck Leasing Company.

There are no traffic lights from South Main Avenue to the crossroads leading to State Docks and River City Industries, a distance of over a mile by road.

There are no sidewalks along either of the three routes that traffic must follow from Eastside to Westside and Westside to Eastside in our City.

There has been no school transportation in our City School Systems. Of the 824 pupils in the two schools, five hundred eighty-three (583) are not eligible for State supported bus transportation if such were available due to their living within two miles of school.

A mass upheaval at this time would be detrimental to the educational progress of the children involved. This in itself, is reason enough to leave present in force now. Undue stress would be created by sudden school environment changes. The total school programs have been planned with the zoned desegretation plan in mind; and we shall be hard pressed to plan, prepare and get set for a year's work on an entirely different plan if pairing is required by August 26th this year. Pupils who have been notified of placement, etc. and teachers who have been assigned and

prepared for one set -up will hardly be able to adjust with such short notice.

A change of the magnitude set by the Court must be dealt with carefully and preferably slowly. This can hardly be done in the very short while from now to the date set for school opening this year.

/s/ A. A. Knight
A. A. Knight
Superintendent
Demopolis City Schools

Subscribed and sworn to before me this 18th day of August, 1977.

/s/ Bobbie W. Sanford
NOTARY PUBLIC
STATE AT LARGE

STATE OF ALABAMA

EXHIBIT "B"

MARENGO COUNTY

Before me the undersigned authority in and for said State and County personally appeared Robert B. Templin who, having been first duly sworn, deposes on oath and states as follows:

My name is Robert R. Templin and I am Principal, Westside Elementary School and, as such, am familiar with facts stated herein.

(1) The immediate action for pairing the schools on August 29, 1977, would be in my opinion emotionally traumatic to the students because of the lack of appropriate time for preparation.

(2) At this time, which is one week away from the official opening date for the school year 1977-78, the confusion on the part of the teachers, staff and students is already great. Any immediate move would be chaotic for everyone involved.

(3) The community must have time to prepare itself phychologically for a move of such magnitude, in order to maintain a practical resemblance to our present black and

white identity. The maintenance of acceptable racial levels is crucial. If the community has time to study the situation, maybe we will not have a high degree of "white flight" from public education.

(4) Time must be furnished for appropriate sidewalks or bike paths to be constructed to give students a safe manner to get from one school community to another. Presently, there is heavy industrial traffic and no sidewalks or bike paths. Two long bridges must be crossed with no satisfactory walks. Numerous sharp curves are involved.

/s/ Robert B. Templin
Robert B. Templin
Principal, Westside
Elementary

Subscribed and sworn to before me this 18th day of August, 1977.

/s/ Bobbie W. Sanford
NOTARY PUBLIC
STATE AT LARGE

STATE OF ALABAMA

EXHIBIT "C"

MARENGO COUNTY

Before me the undersigned authority in and for said State and County personally appeared Chief A. E. Cooper who, having been first duly sworn, deposes on oath and states as follows:

My name is Chief A. E. Cooper and I am Chief of Police, City of Demopolis, and, as such, am familiar with facts stated herein.

I, Chief A. E.Cooper, have been Police Chief in the City of Demopolis, Alabama since April 15, 1962, and was Chief of Police for 10 years in another jurisdiction prior to this. At the present time, the Demopolis Police Department consist of a police chief and an assistant chief, and sixteen officers. This department is entrusted with the police duties of a city with approximately 8000 population. The City of Demopolis is approximately 45% black and 55% white.

To go into pairing situation would require a great deal of planning and schooling for Demopolis officers in what would be expected of them in the face of any situation that may arise due to us having no prior notice of this. A number of our officers are on summer vacation at this time and will not return until about the 25th of August. Furthermore, the Demopolis Police Department operates on a budget that is prepared well in advance.

Our 1978 budget has already been submitted and we did not request additional manpower or money for some additional overtime that we are sure this Order will necessitate.

As the Court is well aware, the City of Demopolis is a small City but is spread out over a very large land area. The pairing of the schools will necessitate children having to walk from one to three miles unless bussing is provided. Along the three routes to the Westside School, for over 1½ miles, there is not one sidewalk for the use of students, or any other pedestrians. Furthermore, there are several bridges that these students would have to travel that have no provisions for foot travel.

As the department is now operating, four men is about maximum for any one shift and most of the time it is three men. For these officers to try to patrol the schools and take care of the added traffic on our inadequate streets and roads, will be almost beyond our capacity at this time. When added to their regular duties moreover, at the present time, the Demopolis Police Department is operating the only ambulance service in Marengo County and surrounding areas. This ambulance service has been a great drain on our manpower and it cannot take second place to any other service due to its nature. I, as Chief of Police, need to have time to approach the Council for more men and vehicles to give adequate police protection to our children and

citizens involved. We would further need time for a schooling system within our department to acquaint our officers with these changes and to provide enforcement of the Court's ruling. At this time, I do not see how we can adequately do these things in the short period of time available us, but you may rest assured that the Demopolis Police Department will try in every way to meet their obligations to the students, citizens, and the Courts if it is within our power.

/s/ A. E. Cooper
Chief A. E. Cooper
Chief of Police
City of Demopolis

Subscribed and sworn to before me this 18th day of August, 1977.

/s/ Bobbie W. Sanford
Notary Public
State at Large

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR

THE FIFTH CIRCUIT

NO. 77-1233

ANTHONY T. LEE, Et al.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellant,

NATIONAL EDUCATION ASSOCIATION, INC.,

Plaintiff-Intervenor,

v.

DEMOPOLIS CITY SCHOOL SYSTEM, Et al.,

Defendants-Appellees.

PETITION FOR REHEARING EN BANC

STATEMENTS OF COUNSEL FOR REHEARING EN BANC
(Rule 12 F.R.A.P., Fifth Circuit Court of Appeals)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Fifth Circuit, and the following decisions of the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Carr v. Montgomery County Board of Education, 377 F.Supp. 1123, 511 F.2d 1374; (1974)

Stout v. Jefferson County Board of Education, 537 F.2d 800; (1976)

Washington v. Davis, 426 U.S. 229 (1976)

Austin Independent School District v. United States, 97 S.Ct. 517 (1977);

Dayton Board of Education, et al., v. Mark Brinkman, et al, 45 LW 4910 (June 27, 1977)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Are the rights of individual school children attending school in a small school district, to be defined and treated in the same manner as the rights of individual school children in a large city and a large school district?

2. Are the same criteria to be used to eliminate the racial imbalance in elementary schools as are used in junior high schools and in high schools?

3. May the Court presume an intent to discriminate on the part of local authorities on the basis of racial imbalance in some of the schools in a system where all students in the district, in grades 7-12, are assigned to one junior and one senior high school and the authorities are operating two elementary schools on a zone line established by the lower Court?

4. In the instant case, where mandatory segregation by law of the races has long since ceased, what burden must the Plaintiff-Appellant meet, if any, to entitle him to a system-wide remedy?

/s/ H. A. Lloyd
Attorney of Record
for Demopolis City
School System

PETITION FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Demopolis City School System, the Defendant-Appellee above named, presents this, its Petition for a rehearing in the above entitled cause; suggests to this honorable Court that the same be heard en banc; and, in support thereof, respectfully shows:

I

The Court in its opinion of reversal herein has failed to take into consideration the detailed findings of fact in the Order of the lower Court dated December 29, 1976, and upon which that Order was based.

II

The Court in its reversal opinion failed to apply the principals laid down in Carr v. Montgomery County Board of Education, 511 F.2d 1374, and Stout v. Jefferson County Board of Education, 537 F. 2d 800 (1976), giving no weight to geographic or demographic considerations, including the practical considerations of hazard, distance, and expense, all of which are incorporated in the evidence and in the findings of the lower Court in this instant case.

III

The Order of Reversal in the instant case is in conflict with the Carr case and the Stout case previously decided by this honorable Court.

IV

The Order of Reversal in the instant case is contrary to the decisions laid down in the Supreme Court of the United States in Washington v. Davis, 426 U.S. 229 (1976); Austin Independent School District v. United States, 97 S.Ct. 517 (1977); and Dayton Board of Education, Et al., v. Mark Brinkman, Et al. 45 LW 4910 (June 27, 1977).

V

The Court makes no finding of discrimination on the part of local authorities in the Reversal Order, but simply presumesan intent to discriminate on the part of the local authorities because of the unique statistics involved in this case. To presume an intent to discriminate without any finding of discrimination is, in the opinion of the Petitioner, clearly in conflict with Washington v. Davis, Supra. and Brinkman, Supra.

VI

The Court, in its opinion of reversal herein, cites the case of Brinkman, Supra., as a basis for finding the Order of the District Court erroneous; and, in

the opinion of Petitioner, this case does not support such a ruling based upon the facts and evidence adduced in the lower Court.

VII

To require a pairing of the elementary schools in the Demopolis School System would be unfeasible and contrary to practical considerations.

ARGUMENT

I

This school is before this honorable Court after having operated under a terminal Order of desegregation rendered by a three-Judge panel in the Middle District of Alabama more than seven years ago, which Order has now been thoroughly reviewed by the District Court for the Southern District of Alabama, upon several oral hearings, lengthy depositions of various parties, and various briefs and oral arguments of the parties. This review culminated in the Order of the lower Court, dated December 29, 1976 (Record, Vol. I, P. 56-62). This Court, in its Reversal Order, recites the various racial statistics in the elementary schools involved; finds that the two schools are two and a quarter miles apart by road, a drive of under ten minutes; and are separated by no very significant barriers. The Court then concludes that "on these essential and not seriously disputed facts, and without subsidiary

findings" the lower Court found the Demopolis System to be unitary. A reference to the Order of the lower Court, however, shown in the Record as above cited, reveals that the Order does have recited therein findings and conclusions which were quite pertinent to a decision in this matter. For instance, in referring therein to the original three-Judge Order rendered in 1970; "the facts prevailing at the time the Order was entered have not changed to any measurable degree". (Record, Vol. 1, Page 60). The lower Court further concluded from the evidence (Record, Vol. 1, Page 59-60) that the School Board itself had not undertaken any procedure or process that continued or enhanced segregation and (Record, Vol. 1, Page 61) that, although some complaint had been registered that the School Board had not strictly enforced the attendance zoning, it was found from the evidence that where this problem had existed, it had been substantially corrected, if not totally so; and that diligence was being employed by the School Board to insure the integrity of that part of the Court's prior Order. The lower Court also found, as reflected in its Order (Record, Vol. 1, Page 57), that the original three-Judge Court had before it for its consideration the same information that was presented to the lower Court in the instant case, namely the size of the elementary schools, the distance to be traveled, the fact that the Eastside was an all-black school

prior to desegregation, and the Westside was an all-white school prior to desegregation, and the fact that the Eastside zone (objectively established in the Order of the three-Judge panel) had approximately 160 white students zoned to attend Eastside School and that the Westside zone had 52 black students zoned to attend that school. From these facts and these findings, reflected in the lower Court's Order, and based upon the latest statistics before the Court at the time of that Order, it can be readily seen that more black students were actually attending the Westside School in the 1975-76 school year than were even anticipated by the three-Judge panel's Order. Moreover, while the evidence is not before the Court, the 1976-77 enrollment report shows a substantial gain in the attendance of black students in the Westside School. On the other hand, the projected 160 white students zoned to attend the Eastside School were lost in great degree, as shown by the evidence in the Record, through demographic changes in great measure, and through registration in private schools in lesser measure. This fact is not controverted at all by the Plaintiffs.

Petitioner is of the opinion that the Court is in error in failing to take into consideration the findings of fact, and the conclusions hereinabove detailed.

II - III

The entire thrust of the Court's reversal opinion is the assumption that desegregation in the elementary schools of Demopolis has entirely failed simply because of the racial imbalance. The cases of Carr, Supra. and Stout, Supra., as well as other more recent decisions, do not accept the principal that desegregation (or the establishment of a unitary system) does not exist simply because of racial imbalance. These decisions give weight to practical considerations of changes in demographic patterns, geographic conditions, hazards, distance, and expense, all of which may be contributing factors accounting for racial imbalance, and none of which are attributable to discrimination or actions to preserve segregation on the part of the school authorities. The Court has either ignored or overlooked the existence of a number of the above mentioned practical considerations which are clearly shown by the evidence to be present in the instant case; or, because this is a small school system, these considerations are not to be given the weight which they were given in the Carr and Stout cases. In any or either event, the Court disposes of any similarity between the cases by finding that the Demopolis School System is not contemplated to be such a system as those mentioned in the above cited cases. Petitioner submits, and strongly contends, that the same causes and effects

creating the conclusions reached in Carr and Stout are also applicable and present in the instant case.

IV and V

In the Austin Independent School District v. United States, Supra. the Court stated:

"As suggested by this Court's remand upon Washington v. Davis, Supra., the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified. The Court also seems to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights".

The above cited case, as well as the Brinkman case, makes it clear that where segregation by law has ceased, it is the task of the District Court, as well as the Court of Appeals, to first determine whether there has been any action in the conduct of the business of the school board which was intended to, or did in fact, discriminate against minority pupils. The lower Court found no such discrimination as would justify overturning the three-Judge panel Order issued in 1970. In fact, witnesses of both races testified as reflected by the Record, that no cases of discrimination existed. If, indeed, such discrimination did exist, it would then be

incumbent upon the Court under the Austin School case, as well as the others above cited, to correct by balancing of the individual and collective interests, the condition that offends the Constitution, and the scope of the remedy would be determined by the nature of the violation. Here, the evidence shows no such violations by the school authorities; yet, the Court, in its reversal opinion, seeks to impute an intent to discriminate to the school authorities. The Petitioner strongly contends that to uphold such an Order would be contrary to the decisions above cited.

VI

The Order of Reversal recognizes that segregation by law has ceased in the instant case, yet goes on to observe: "...but all is as it was before it did". Petitioner is of the opinion that the statement that "all is as it was before it did" is not supported by the facts in the instant case and that a racial imbalance, in and of itself, cannot remove the instant case from the operation of the principles laid down in Brinkman, Supra.

VII

One important factor that must be strongly considered in the instant case and has been repeatedly considered in previous decisions, is the welfare of the individual student. (See Austin Indepen-

dent School District, Supra., and Brinkman, Supra.) Justice Brennan, in the Brinkman case, reminded the District Court to "always be conscious that it is the rights of individual school children that are at stake, and that it is the Constitutional right to equal treatment of all races that is being protected. It is also to be noted in that case that the District Court laid down certain guidelines in the case of elementary school students (45 LW, at Page 4911, Footnote 2(3), specifying that "no student should be transported for a period of time exceeding 20 minutes, or two miles, whichever is shorter". The facts in the instant case show that while the two elementary schools are two and a quarter miles apart, some of the smaller children in grades 1-6 would be forced to walk three and sometimes four miles, one way, to their school in the event these schools were paired, and in the event the child had no transporation. This situation, coupled with the fact that there are few, if any, sidewalks along the routes to these schools, requiring the students to walk on the sides of the highways, would impose an unbearable burden on children of both races, creating exposure to accidents and injury and anxieties to both student and parent which would not be justified from a practical consideration simply to improve racial balance. There are other practical considerations abundantly shown in the record, involving demographic patterns and financial outlays beyond the cap-

abilities of the system which have been overlooked in the present Reversal Order.

Moreover, Petitioner wishes to emphasize that the majority to minority provision of its desegregation Order, as may be seen from the Record, is actively being used by black students and has increased over the years.

Wherefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted, and that the judgment of the District Court be, upon further consideration, affirmed.

/s/ H. A.Lloyd
Attorney for Petitioner and
Defendant-Appellee
Post Office Drawer Z
Demopolis, Alabama 36732

I, H. A. Lloyd, Attorney for the Demopolis City School System, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for the purpose of delay.

/s/ H. A.Lloyd
H. A.Lloyd

APPENDIX F

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth Tel 504-589-6514
Clerk 600 Camp Street
New Orleans, La. 70130

October 4, 1977

TO ALL PARTIES LISTED BELOW:

No. 77-1233 - Anthony T. Lee, U.S.A., National Education Assoc. v. Demopolis City School System

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing*, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth,
Clerk
/s/
By Brenda M. Hauck
Deputy Clerk

*on behalf of appellees, Demopolis City School System,

cc: Messrs. Thomas M. Keeling
Burtis M. Dougherty
H. A. Lloyd

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1977

NO. _____

DEMOPOLIS CITY SCHOOL SYSTEM,
Petitioner,

v.

UNITED STATES OF AMERICA,
PLAINTIFF-INTERVENOR,
Respondent.

CERTIFICATE OF SERVICE

I, H. A. Lloyd, one of the Attorneys for Demopolis City School System, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of November, 1977, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the several parties thereto as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to W. A. Kimbrough, Jr., Esquire, United States Attorney for the Southern District of Alabama, P. O. Drawer E, Mobile, Alabama; and by leaving a copy thereof at the office of the Solicitor

General, Department of Justice, Washington, D. C. 20530; and by leaving a copy thereof at the office of Burtis M. Dougherty, Esquire, Attorney of Record for Plaintiff-Intervenor, Department of Justice, Washington, D.C. 20530.

2. On National Education Association, Plaintiff-Intervenor, by mailing a copy in a duly addressed envelope,with first class postage prepaid, to its Attorney of Record, Solomon S. Seay, Jr., Esquire, Gray, Seay, & Langford, 352 Dexter Avenue, Montgomery, Alabama 36104.

_____

Attorney for Petitioner,
Demopolis City School System
P. O. Drawer Z
Demopolis, Alabama 36732

No. 77-649

In the Supreme Court of the United States

OCTOBER TERM, 1977

DEMOPOLIS CITY SCHOOL SYSTEM, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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DEMOPOLIS CITY SCHOOL SYSTEM, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This school desegregation suit was commenced by private plaintiffs, and the United States then intervened as a plaintiff.[1] The suit challenged, among other things, racial discrimination in the City of Demopolis, a small city in which racial separation was enforced by law for 15 years after the decision in *Brown* v. *Board of Education*, 347 U.S. 483 (Pet. App. 59).

A three-judge district court entered an order on June 29, 1970, holding that the school system had been operated and maintained in violation of the Constitution. The

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[1]The present case is part of *Lee* v. *Macon County Board of Education*, M.D. Ala., C.A. No. 604-E, which was filed in 1963 to challenge racial discrimination in school districts throughout the State of Alabama.

order (Pet. App. 39-48) assigned all secondary students to one junior high and one senior school, thus effectively desegregating those grades. The court did not, however, adopt a similar remedy for the elementary schools; it instead attempted to disestablish the statutorily dual school system by geographic zoning (*id.* at 39-42).

The attempt failed. Eastside Elementary School, previously open only to black students, remained overwhelmingly black; Westside Elementary School, previously open only to white students, remained overwhelmingly white (Pet. App. 58).[2] The United States therefore sought supplemental relief to desegregate the elementary schools. Although petitioner "has repeatedly stated that only pairing will effectively desegregate these schools" (*ibid.*), the district court declined to order additional relief (*id.* at 49-56).

The court of appeals reversed (557 F. 2d 1053; Pet. App. 57-61). It held that the 1970 order had not effectively addressed the continuing effects of discrimination in the elementary schools and that the district court's judgment therefore must be modified to comply with the requirements of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1.[3] The court of appeals ordered the two elementary schools to be paired, so that neither would be racially identifiable.

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[2]From 1971 to 1976 Eastside had an enrollment between 95 and 100 percent black, and Westside had an enrollment between 87 and 91 percent white (Pet. App. 58).

[3]For other post-*Swann* orders see, *e.g.*, *United States* v. *Texas Education Agency* (*Richardson ISD*), 512 F. 2d 896 (C.A. 5), certiorari denied, 423 U.S. 837; *Hereford* v. *Huntsville Board of Education*, 504 F. 2d 857 (C.A. 5), certiorari denied, 421 U.S. 913. Post-*Swann* relief has been granted to modify other 1970 orders in the *Lee* case similar to the one entered against petitioner. See, *e.g.*, *Lee* v. *Macon County Board of Education (Anniston City)*, 483 F. 2d 244 (C.A. 5); *Lee* v. *Macon County Board of Education* (*Dothan City*), M.D. Ala., C.A. No. 1060-S, decided April 4, 1975.

The judgment of the court of appeals is correct, and it presents no novel issue requiring review by this Court. It is unquestioned that petitioner practiced racial discrimination; the two elementary schools were built and operated as one-race schools. They acquired a racial identity that cannot be overcome simply by establishing a policy of facially-neutral school assignments.[4] See *Swann*, *supra*; *Dayton Board of Education* v. *Brinkman*, No. 76-539, decided June 27, 1977.

The pairing remedy ordered by the court of appeals is directly related to redressing the conditions caused by petitioner's system-wide constitutional violation. See *Dayton Board of Education* v. *Brinkman*, No. 76-539, decided June 27, 1977. And undisputed evidence in the record supports the conclusion (Pet. App. 58-59) that pairing is feasible and not unduly burdensome. The two schools are only two and one-quarter miles apart by road, and they are not separated by any significant barriers (*id.* at 58).[5] In order to attend the racially-separate schools

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[4]Petitioner relies on a number of cases, including *Washington* v. *Davis*, 426 U.S. 229, that establish the criteria for determining when unconstitutional racial discrimination has taken place. But there is no similar question in the present case; petitioner's schools were segregated by law, and the separation was maintained by official action for more than a decade after *Brown*. Under these circumstances, the school district must eliminate "root and branch" all of the present consequences of its prior discrimination. *Green* v. *County School Board*, 391 U.S. 430, 438. There is no need for a plaintiff to prove that the school authorities intended the consequences to continue; it is enough that the discrimination was intentional and that its consequences persist.

[5]Petitioner contended in the court of appeals, for the first time, that there were physical barriers (see Pet. App. 63-72). But petitioner did not so argue in the district court, and its argument is unsupported by record evidence.

before 1970, both black and white elementary students routinely crossed from one side of the city to the other (Supp. R. 19-21)[6], a journey fully as arduous as that required under the pairing remedy. All students in the secondary grades now attend one school (Pet. App. 41) without apparent problem. All elementary school students could be accommodated by two school buses operating shuttle routes (III R. 27-28 (Hurtado deposition)),[7] and this transportation would eliminate any inconvenience or danger that elementary students might encounter in walking on or crossing public roads.

The court of appeals applied well-established principles to the particular facts of this case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

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[6] "Supp. R." refers to the supplemental record in the court of appeals.

[7] "III R." refers to volume III of the record in the court of appeals.